No. 80-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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Petitioners, the Independent Insurance Agents of America, Inc. and three of its constituent state associations of independent insurance agents, hereby reply to the brief in opposition submitted by the respondent Board of Governors of the Federal Reserve System.

I.

In defense of its summary approval of the bank holding company applications here in question, the respondent Board argues only that, in each case, it made a "finding of public benefits."[1] That argument highlights once again the fact that, in each case, the Board did nothing more than *recite* its *conclusion* that the "public benefits"

[1] Brief for the Respondent in Opposition, at 4; *see id.* at 4-6.

test of Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)(8) (1976), had been satisfied.

In *none* of these cases did the respondent Board identify any of the "public benefits" which it purported to have "found," and in *none* of these cases did the Board even attempt to justify its conclusion on the basis of evidence of record. To the contrary, it made *no* factual findings and elicited *no* evidence upon which it could possibly have reached its conclusion. In the absence of any evidence of record, the Board, without explanation, merely parrotted the operative language of Section 4(c)(8).

Petitioners submit once again that the unthinking regurgitation of a statutory standard does *not* constitute a factual finding, does *not* "indicate[] the determinative reason for the final action taken," [2] and, in these cases, was *not* supported by *any*—much less, "substantial"—evidence.

II.

The respondent Board also argues once again that *de novo* entry of a bank holding company into a nonbanking field is presumptively in the public interest:

> "In the absence of any adverse effects, and because *de novo* entry into a previously approved * * * activity reasonably can be expected to be pro-competitive and to provide additional public benefits, approval of these applications is clearly warranted under the express terms of Section 4(c)(8) . . . ." [3]

It is precisely to this emasculation of the Section 4(c)(8) "public benefits" test that petitioners have attempted to draw the attention of this Court.[4]

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[2] *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

[3] Brief for the Respondent in Oposition, at 7, n.5. *See also id.* at 8 (". . . *de novo* entry itself is an important source of public benefits . . . .").

[4] *See* Petition for Writ of Certiorari, at 4-9.

There exists *no* presumption of public benefits under Section 4(c)(8), and the respondent Board's attempt to create such a presumption was unwarranted and erroneous. *See Florida Ass'n of Insurance Agents, Inc.* v. *Board of Governors of the Federal Reserve System*, 591 F.2d 334, 340 and n.15 (5th Cir. 1979); *Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224, 235 n.6 (5th Cir. 1976), *on rehearing*, 558 F.2d 729 (1977), *cert. denied*, 435 U.S. 904 (1978).[5]

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[5] *See also Citicorp* v. *Board of Governors of the Federal Reserve System*, 589 F.2d 1182, 1190 (2d Cir. 1979); *Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System*, 170 U.S. App. D.C. 278, 288-89 and n.29, 516 F.2d 1206, 1215-16 and n.29 (1975); *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 39 (8th Cir. 1974); H.R. Rep. No. 1747, 91st Cong., 2d Sess. 19 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561, 5570.

The respondent Board is attempting in these cases to achieve what it failed to achieve by regulation in 1971—the creation of a presumption of "public benefits" in *de novo* entry applications.

It was in 1971 that the respondent Board, without public notice or opportunity for comment, issued its so-called "simplified procedures" regulation. That regulation would, among other things, have created a presumption that *de novo* insurance applications satisfy both the "clearly related" and the "public benefits" requirements of Section 4(c)(8). The petitioner Independent Insurance Agents of America, Inc. petitioned the Court of Appeals for the District of Columbia Circuit for review of that regulation. *National Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, No. 71-1744 (D.C. Cir., filed Sept. 17, 1971). *The Board thereupon withdrew the challenged regulation.* The regulation was never re-issued and—although it continues to be printed each year in the Code of Federal Regulations (12 C.F.R. § 225.4(b)(3) (1980))—it has never been relied upon by the Board in its approval of any bank holding company application.

The respondent Board's attempt improperly to achieve in these cases what it despaired of achieving in 1971 must not be countenanced by this Court.

III.

At issue in these cases is the continued vitality of the century-old congressional determination that the business of banking shall remain separated from other forms of commerce. In the arena of bank holding company activity, that policy is safeguarded and implemented by the requirements of Section 4(c)(8) of the Bank Holding Company Act.

Never before has an appellate court permitted the respondent Board to ignore those express statutory requirements and to approve a bank holding company application in the absence of an *affirmative showing* that such approval would result in *demonstrable public benefits* that *outweigh* potential adverse effects. Unless reviewed and reversed by this Court, the decision of the court of appeals in these cases to do exactly that will have rendered meaningless the carefully constructed safeguards of Section 4(c)(8).

For these reasons, and for the reasons set forth in their petition for a writ of certiorari, petitioners again pray that such a writ issue to review the decision of the court of appeals.

Respectfully submitted,

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